Steven F. Alder, (Bar No. 0033)
Fredric Donaldson, (Bar No. 12076)
Assistant Attorney General
Counsel for Division of Oil, Gas and Mining
1594 West North Temple, Suite 300
Salt Lake City, Utah 84116
Telephone: (801) 538-5348

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, SOUTHERN UTAH WILDERNESS ALLIANCE, NATURAL RESOURCES DEFENSE COUNCIL, and NATIONAL PARKS CONSERVATION ASSOCIATION, Petitioners, DIVISION OF OIL, GAS AND MINING, Respondent, ALTON COAL DEVELOPMENT, LLC Intervenors,	DIVISION'S MEMORANDUM CONCERNING SCOPE OF REVIEW, RECORD OF DECISION, DISCOVERY AND STANDARD OF REVIEW Docket No. 2009-019 Cause No. C/025/0005

In response to the Board's Order as contained in its Minute Entry of December 17, 2009, the Division of Oil, Gas and Mining (Division) hereby submits the following memorandum of points and authorities as requested by the Board addressing: (1) the Board's scope of review when reviewing decisions to approve an application for a permit to conduct surface coal mining operations, (2) the record of the Division's decision subject to review, (3) the effect of the scope of review on the rights and nature of discovery, and (4) the standard of review to be applied in the formal adjudication of the above entitled Request for Agency Action.

SUMMARY OF DIVISION'S POSITION

The scope of the hearing should be limited to a review the *"reasons for the final determination"* (Utah code §40-10-14(3)) permitting an evidentiary hearing with opportunity to challenge and defend the Division's decision.

The decision that is subject to appeal is not limited to review of a formal 'record of decision' document. There is no advantage or basis in the rules for designating a record of decision prior to the hearing.

A limited right of discovery may be a necessary compliment to the statutory scheme of providing an opportunity for a formal evidentiary hearing.

Finally, the standard of review should limit the Board's inquiry to whether the Division's decision is in error based on a preponderance of the evidence recognizing that the Petitioners have the burden to show that the decisions is factually or legally wrong, and should allow a degree of deference to the decision in acknowledgment of the expertise of the Division.

DISCUSSION

Scope of Review. The statutorily designated scope of the hearing is to review the *"reasons for the final determination"* (Utah code §40-10-14(3)). Such a Board review requires an analysis of: (1) the information provided by the applicant, Alton Coal Development LLC (ACD) in its application and revisions, (2) the information the contained the Division's reviews and conclusions as they pertain to the requirements of the Coal Act, and (3) if the Board finds that other supplemental information is necessary (to determine if the information provided is sufficient, and if the conclusions are correct), then the scope of review should extend to the admission of that information. This is the same scope of review as the Board applied in the most

recent appeal by SUWA of the permit application for the Lila Canyon Mine (Lila II) (see August 13, 2007 Order, Attached as Exhibit 1), and the same scope of review that was applied by the Board in all other prior reviews of similar coal permitting issues as identified by the Board's August 2007 Order, with the exception of the first challenge by SUWA to the Lila Canyon Mine permit (Lila I). Hearings with this scope of review include SUWA's appeal of Andalex's Smokey Hollow Permit Application in 1996 (*In the Matter of the Request by Petitioner Southern Utah Wilderness Alliance for Board Review*, Docket No. 95-023, Cause No. PRO/025/02) and Castle Valley Special Service District's appeal of the revision of Co-op Mining Company's Bear Canyon Mine permit which was subsequently appealed and affirmed by the Utah Supreme Court (*Castle Valley Spec. Serv. Dist. v. Board of Oil, Gas, and Mining*, 938 P.2d 248, 253 (Utah 1996)).

The reasoning in the Lila II decision which integrated the requirements of the Utah Coal Act (Utah Code §§ 40-10-1 through 24), the Utah Administrative Procedures Act (Utah Code §§ 63G-4-101 through 601), and the Utah Judicial Code (Utah Code § 78A-3-102) is still sound. The plain meaning of these statutes requires that an evidentiary hearing be conducted with all parties having the right to call and cross examine witnesses and present evidence concerning the issues raised by Petitioners' challenge of the decision approving the permit application. The Coal Act mandates that "for the purposes of the hearing, the board may administer oaths, subpoena witnesses or written or printed materials, compel attendance of witnesses or production of the materials, and take evidence including, but not limited to a site inspection of the land to be affected . . . ." Utah Code § 40-10-14(5). The Utah Coal Act further provides that the hearings conducted by the Board are governed by the Utah Administrative Procedures Act which

defines formal adjudicative proceedings as allowing for testimony and documentary evidence for the purpose of obtaining a full disclosure of relevant facts. Utah Code § 63G-4-206(2009).

A significant reason for the Board's prior determination that the scope of review required more than an appellate type administrative review of the Division's decision is the fact that under Utah's scheme the Board's decision is appealed directly to the Utah Supreme Court. Thus this formal adjudicative hearing is the only opportunity to create a record for review and the only opportunity for opponents to present evidence and testimony and cross-examine witnesses. These due process needs were acknowledged as part of the rationale for allowing an evidentiary hearing to review the informal proceeding that results in an administrative decision. *Cordova v. Blackstock*, 861 P.2d 449 (Utah 1993).

The fact that the scope of review may require that the Board hear the evidence involved in both reaching the decision and evidence that is alleged to counter the finding, does not mean that the Board is to take upon itself the role of making the finding. Findings are required by statute and rule to be made by the Division. See for example Utah Admin. code R645-300133; and 645-302-321.100) The scope of the review for the Board hearing is not to repeat the application review process with the Petitioners allowed to pose as opposing applicants. Such a determination would go beyond "a review of the reasons for the [division's] final determination". The language in the statute providing that after the hearing the Board "shall issue . . . the written decision of the board granting, or denying the permit in whole or part and stating the reasons" (Utah code §40-10-14(3)) does not mean that the Board in "granting or denying the permit in whole or part" is to take the place of the Division in the myriad of ways the Division is required by the regulations to make judgments about the permit application. The Board is to review the

reasons for the final determination. (Utah code §40-10-14(3)) The Board may disagree and remand, reverse or modify the permit decision; or the Board may agree and grant the permit.

In the Federal system, coal mine permit appeals from decisions by the Office of Surface Mining and Reclamation and Enforcement (OSM) are heard by administrative law judges and ultimately reviewed by the Interior Board of Land Appeals (IBLA) or the Federal district court. *See* 43 C.F.R. § 4.1(b)(3) & 43 C.F.R. § 4.1360(a) (2009). The Code of Federal Regulations in Title 43. Subpart L of Title 43 provides special procedures for hearings and appeals by the IBLA under SMCRA. 43 C.F.R. § 4.1(b)(3). The scope of review for an approved permit on appeal is spelled out in the IBLA regulations and is limited to a consideration of whether the permit application "fails in some manner to comply with the applicable requirements of the Act [SMCRA] or the regulations, or that OSM should have imposed certain terms and conditions that were not imposed." 43 C.F.R. 4.1366(a)(2). This language, together with the "review of the reasons for the final determination" language from SMCRA, limits the appellate scope in federal proceedings to a determination of whether the permit is supported by evidence and meets the applicable legal requirements.

The Board's scope of review should follow the decision in Lila II and the federal rules and likewise be limited to an evidentiary inquiry into the reasons for the decision.

Record of Decision. The decision that is subject to appeal is not limited to a formal 'record of decision'. Neither the Utah Coal Act nor SMCRA has a definition of, nor a requirement or procedure for the creation of, such a 'record of decision' document. Any attempt to define a 'record of decision' ultimately depends on questions of relevance and completeness. The Board is the ultimate gate-keeper over the admission of evidence relative to the decision

under review at the hearing and as such can determine the record of decision. To begin the review, there exists a public record kept by the Division that contains all of the correspondence between the applicant and the Division and others and records of the analysis regarding the application as part of the decision making process. This information is filed in the Pubic Information Center (PIC) and a CD containing electronic copies of these documents has already been provided to all parties. Information other than this may be sought by limited discovery and may be admitted if it is relevant to demonstrate error in the application or if it may demonstrates a bias, lack of consistency resulting in an arbitrary finding, or other error. Decisions about what may be included should depend on the context and scope of specific discovery requests, if any.

The prior appellate review decision, Lila I, despite the creation of a Bates Stamped 'Record of Decision' consisting of over 10,000 pages required exhaustive arguments over the rights of the parties to supplement the record to show bias through exhibits and witness testimony. *See In the Matter of the Request by Petitioner Southern Utah Wilderness Alliance for Board Review*, Docket No. 2001—027, Cause No. C/007/013-SR98(1) (Lila I). Nothing was made easier or clearer by creating and designating an "administrative record of decision." The purpose of the Board's hearing is to create a 'record of decision' that will be subject to judicial appellate review as set out by the requirements of the Coal Act, the Procedural Rules of the Board (R641), and the Utah Judicial Code.

In the Federal system, a record is created when a permit decision is appealed during the course of an evidentiary hearing. The record then includes all of the testimony and evidence submitted. At the IBLA level, after a hearing has been held, "the record" upon which the IBLA may base its decision includes "the transcript of testimony or summary of testimony and exhibits together with all papers and requests filed in the hearing," or, if a hearing has been held on an

appeal pursuant to instructions of the IBLA, "this record [i.e. the record of the hearing] shall be the sole basis for decision insofar as the referred issues of fact are involved except to the extent that official notice may be taken of a fact as provided..." 43 C.F.R. § 4.23 (2009).

There is no advantage or basis for designating a record of decision prior to the hearing.

Discovery. A limited right of discovery may be a necessary compliment to the statutory scheme of providing an opportunity for a formal evidentiary hearing to challenge and defend the Division's decision. Given the scientific, technical and complex nature of the issues to be examined, there is a need to identify exhibits and witnesses in advance of the hearing, to disclose expert witnesses and expert reports or summaries, and to provide time to review the same. It may be reasonable for parties to have a limited right to take the deposition of anticipated adverse witnesses. Given the expansive nature of public access provided to the documents that consist of the decision making process, for the decision that is subject to challenge, there is a more limited need for, and less justification for, general 'fishing expedition' interrogatories and requests for admissions and production of documents.

In the Federal system, though generally permitted regarding matters relevant to the subject matter involved in the proceeding, discovery may be limited by an order upon motion and for good cause shown to protect a party from undue burden, expense, annoyance, embarrassment, or oppression. 43 C.F.R. § 4.1132. Such an order may provide that the discovery not be had; that the discovery may be had only on specified terms and conditions, including a designation of the time and place; that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; that certain matters not relevant may not be inquired into, or that the scope of discovery be limited to certain matters; or

that discovery be conducted with no one present except designated persons; or a trade secret or other confidential research, development, or commercial information may not be disclosed or be disclosed only in a designated way. *Id.*

Any discovery ruling by the Board should depend on the specific nature of the request and should be limited in light of the fact that this is an administrative hearing intended to provide an speedy and economical determination of all issues (Utah Admin. Code R641-100-300) and is subject to the limited scope of reviewing the reasons for the decision. The Board's discovery rulings are subject to review under an abuse of discretion standard. *See Petro-Hunt v. Dep't of Workforce Services*, 197 P.3d 107, 110 (Utah Ct. App. 2008).

Standard of Review. Finally, the standard of review should first acknowledge that the Petitioners have the burden of proving that the decision is in error by a preponderance of the evidence, and should allow a degree of deference to the decision in accordance with the expertise of the Division. Since the question under appeal is limited to whether the Decision was correct [Utah code §40-10-14(3)], and the burden is on "the party seeking to reverse the decision of the [Division]" to demonstrate error, (30 CFR §775.11(5) there is an inherent assumption that the decision should be upheld unless there is a preponderance of evidence to support a finding of error.

The interpretation of the Division and its expertise and practices in the administration of the regulations are to be afforded a degree of deference and should not be over-turned if they are reasonable and consistent with applicable rules and statutes. According this deference is consistent with the Federal practice of the IBLA. *See Harvey Catron Jo D. Molinary*, 134 IBLA 244 (1995) ("The Department [OSM] is entitled to rely on the reasoned analysis of its experts in

matters within the realm of their expertise."); *see also Robert C. Salisbury*, 79 IBLA 370 (1984) ("The Board gives deference to BLM actions which are based on its expertise and which are taken pursuant to defined statutory authority where those actions are supportable."). In the Federal system, decisions of any federal agency, including the OSM, are required to be supported by substantial evidence. 5 U.S.C.A. 556(d).

The Board should adopt a deferential standard for factual determinations and a non-deferential standard for legal determinations consistent with the practice of Utah appellate courts. *See e.g. Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2009 WL 4406250 (Utah 2009). Deference should also appropriately be applied to mixed questions of law and fact. *See Taylor v. Utah State Training School*, 775 P.2d 432, 433 (Utah Ct. App. 1989).

CONCLUSION

As stated, the scope of review is limited to an examination of the "reasons for the decision" as required by statute. This review by virtue of its limited inquiry does not require the Board to re-make the decision, only to uphold the decision as being consistent with the applicable rules and statutes. If the Board finds error it can remand or make its own determination, but in absence of a finding of error the decision is to uphold the Division's decision.

Respectfully submitted this 29 day of December, 2009

Fredric Donaldson

Steven F. Alder, (Bar No #0033)
Fredric J. Donaldson, (Bar No #12076)
Assistant Attorney General
Counsel for Division of Oil, Gas and Mining

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing DIVISION'S MEMORANDUM CONCERNING SCOPE OF REVIEW, RECORD OF DECISION, DISCOVERY AND STANDARD OF REVIEW to be mailed by first class mail, postage prepaid, the 30 day of December, 2009 to:

Denise Dragoo
SNELL & WILMER, LLP
15 West South Temple, Suite 1200
Salt Lake City, UT 84101

Bennett E. Bayer, Esq.
Landrum & Shouse LLp
106 WestVineStreet Suite 800
Lexington KY 40507

Stephen H.M. Bloch, Esq.
Tiffany Bartz, Esq.
SOUTHERN UTAH WILDERNESS ALLIANCE
425 East 100 South
Salt Lake City, UT 84111

Walton Morris, Esq.
MORRIS LAW OFFICE, P.C.
1901 Pheasant Lane
Charlottesville, VA 22901

Sharon Buccino, Esq.
NATURAL RESOURCES DEFENSE COUNCIL
1200 New York Ave., NW, Suite 4500
Washington, DC 20005

Michael Johnson, Esq.
Assistant Attorney General
1594 West North Temple
Salt Lake City, Utah 84116

Bill Bernard
Kane County Deputy Attorney
76 North Main Street
Kanab, UT 84741

Franklin Dansie

Exhibit 1

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

SOUTHERN UTAH WILDERNESS ALLIANCE, **Petitioner,** **vs.** **DIVISION OF OIL, GAS & MINING,** **Respondent,** **and** **UTAH AMERICAN ENERGY, INC.** **Respondent-Intervenor.**	**ORDER** **Docket No. 2007-015** **Cause No. C/007/013-LCE07**

This cause came on regularly for hearing before the Board of Oil, Gas and Mining (the "Board") on June 27, 2007, at 10:00 a.m., in the Hearing Room of the Utah Department of Natural Resources at 1594 West North Temple Street, in Salt Lake City, Utah.

The following Board members were present and participated in the hearing: Acting Chairman Robert J. Bayer; Samuel C. Quigley; Jake Y. Harouny, Jean Semborski and Ruland J. Gill, Jr.

Stephen H.M. Bloch appeared as counsel for Petitioner Southern Utah Wilderness Alliance ("SUWA"). Steven F. Alder and James P. Allen, Assistant Attorneys General, appeared on behalf of Respondent the Division of Oil, Gas and Mining. Denise Dragoo appeared as counsel on behalf of Respondent-Intervenor UtahAmerican Energy, Inc. ("UEI"). Michael S.

Johnson and Stephen Schwendiman, Assistant Attorneys General, represented the Board.

The Board heard oral argument on the legal questions addressed in the following briefs filed by the parties:

- The Division's Memorandum Regarding Conduct of the Hearing ("Division's Opening Brief");

- Utah American Energy, Inc.'s Memorandum Regarding Standard of Review and Scope of Review ("UEI's Opening Brief");

- Petitioner Southern Utah Wilderness Alliance's Opening Brief On Scope of Review ("SUWA's Opening Brief");

- Division's Reply To Memorandum of Petitioner and Respondent-Intervenor Regarding Conduct of the Hearing (Division's Response Brief");

- Utah American Energy, Inc.'s Reply Brief to Petitioner's Opening Brief on Scope of Review and in Support of Intervenor-Respondent's Memorandum Regarding Standard of Review and Scope of Review; and

- Petitioner Southern Utah Wilderness Alliance's Response Brief on Scope of Review ("SUWA's Response Brief");

NOW THEREFORE, the Board, having considered the above-listed briefs and the oral arguments made by the parties at the hearing, and good cause appearing, hereby sets forth its reasoning in support of the ruling it issued in its Minute Entry dated July 12, 2007:

The question briefed and argued to the Board concerns the appropriate scope of evidence to be considered by the Board in this appeal. The parties disagree as to whether the Board should strictly limit its review to an informal record developed in the Division's administrative

process below, or whether the Board may consider additional evidence adduced at a formal evidentiary hearing as part of its review.

For its part, Petitioner SUWA contends that the Board should hear the present matter in a purely appellate capacity, limiting its review to a record of the Division's informal proceeding. SUWA Opening Brief at 1-2. The Division urges that the Board's review should proceed as a full evidentiary hearing on each contested issue and not be limited to the record developed in the Division's informal proceeding. Division's Opening Brief at 3-5. UEI urges that the Board's review should be limited to the record developed by the Division, albeit with supplemental evidence being taken pursuant to a liberal "good cause shown" standard. UEI's Opening Brief at 3-4. For the reasons stated below, in appeals under Section 14 of the Utah Coal Mining & Reclamation Act, the Board, while limiting its review to issues raised at the Division level, will not limit its review to an informal record, but rather will hold an evidentiary hearing at which new evidence may be offered as to each contested issue.

I. Law of the Case

SUWA cites the Board's October 12, 2001 and December 14, 2001 rulings in Docket No. 2001—027, Cause No. C/007/013-SR98(1) in which the Board stated it would hear a prior appeal pertaining to a permit for this same mine "in an appellate tribunal capacity with review limited to the Administrative Record as certified by the Division." SUWA contends that these prior pronouncements constitute the "law of the case" in this matter, and that the Board should only deviate from these rulings, and apply a different scope of review today, if "exceptional circumstances" are shown. SUWA's Opening Brief at 1-2.

The "law of the case" doctrine holds that "a decision made on an issue during one stage

of a case is binding on successive stages of the same litigation." *Thurston v. Box Elder County*, 892 P.2d 1034, 1039 (Utah 1995). While this language from *Thurston*, relied on by SUWA, provides a statement of the general rule, *Thurston* drew certain distinctions concerning application of the doctrine which are important here. *Thurston* recognized several species of the "law of the case" doctrine. "One branch of the doctrine, often called the mandate rule, dictates that" a lower court must not "depart from the mandate" of a superior court. *Id.*. at 1037-38. *Thurston* noted that the "mandate rule lacks the flexibility found in other branches of the law of the case," and requires a court to follow a prior decision even if it believes "that the issue could have been better decided in another fashion." *Id.* at 1038.

The present issue before the Board, however, does not involve application of the mandate rule, but rather the Board's reconsideration of one of its *own* prior decisions. If the law of the case doctrine applies to the Board at all (see below), the present situation involves "a branch of the law of the case doctrine which is more flexible than the mandate rule." *Id.* While *Thurston* and other cases cited by SUWA, such as *Gildea v. Guardian Title Company of Utah*, 31 P.3d 543 (Utah 2001), set forth certain criteria guiding a court's decision whether to depart from its own prior decision in the judicial context[1], *Gildea* ultimately recognizes that courts "need not apply the doctrine to promote efficiency at the expense of the greater interest in preventing unjust results or unwise precedent." *Gildea*, 31 P.3d at 546.

Citing a number of authorities, the Division argues that the doctrine is of questionable applicability in the administrative context. *See* Division's Reply Brief at 2-4 and authorities

[1] Including the "exceptional circumstances" language quoted by SUWA. *See Thurston*, 892 P.2d at 1039; *Gildea*, 31 P.3d at 546.

cited therein. SUWA counters that *Salt Lake Citizen's Congress v. Mtn. States Tel. & Tel. Co.*, 846 P.2d 1245 (Utah 1995) indicates that the doctrine does apply to administrative tribunals. SUWA Response Brief at 2. Because *Salt Lake Citizen's Congress* involved the related but different doctrine of *res judicata*, however, it is unclear whether the law of the case doctrine applies in the administrative context. Even if it does, however, *Salt Lake Citizen's Congress* establishes that an administrative body may deviate from its own legal[2] rulings not where "exceptional circumstances" are shown as SUWA suggests, but rather, if a reasonable basis exists for doing so:

> [These doctrines do] not mean, however, that a rule of law established in adjudication can never be changed by the agency that established it. Administrative agencies must, and do, have the power to overrule a prior decision when there is a reasonable basis for doing so. As this Court stated in *Reaveley v. Public Service Commission*, 20 Utah 2d 237, 241, 436 P.2d 797, 800 (1968), 'Certainly an administrative agency which has a duty to protect the public interest ought not be precluded from improving its collective mind should it find that a prior decision is not now in accordance with its present idea of what the public interest requires.'

Salt Lake Citizen's Congress, 846 P.2d at 1253.

In the present case, the Board's departure from its own prior decision to strictly limit its review in an appeal under Section 14 of the Coal Act to the Division's informal record is reasonable. This is true because, as discussed more fully below, such a scope of review is contrary to the statutes which control the Board and would preclude the development of a record adequate for purposes of judicial appellate review of the Board's decision.

The particular species of the law of the case doctrine which would be applicable to the present case strengthens this conclusion. *Thurston* observed that the doctrine, as it applies to a

[2] The legal (as opposed to factual) nature of the prior decision is relevant to this analysis, see

court's revisiting of its own prior decisions, is a practical doctrine rooted in "efficiency and consistency." *Thurston*, 892 P.2d at 1038. Here, the interests of efficiency and consistency do not outweigh the necessity of the Board engaging in the proper scope of review as mandated by law (see below).

The Board notes that the law of the case doctrine is applied with some flexibility depending upon the nature of the prior ruling at issue. *See* Division's Response Brief at 4 and cases cited therein. In the present case, the prior ruling pertaining to scope of review involved a purely procedural issue concerning the basic role, jurisdiction and function of the Board. It did not, as in *Thurston* or *Gildea*, involve a ruling concerning the rights or claims of any party, or the application of the law to any particular facts. *Salt Lake Citizen's Congress* is instructive on this point. There, the Court discussed the related doctrine of *res judicata* in an administrative context and contrasted administrative decisions which adjudicate particular rights or claims from those which announce legal rules or interpretations:

> When an administrative agency is acting in a judicial capacity and resolves disputed *issues of fact* properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

Salt Lake Citizen's Congress, 846 P.2d at 1251, n.4 (emphasis added).

> Res judicata applies when there has been a prior adjudication of a *factual issue* and an *application of a rule of law to those facts*. In other words, res judicata bars a second adjudication of the same *facts* under the same rule of law.

Id. at 1251 (emphasis added). *Salt Lake Citizen's Congress* recognized that the binding effect of announcements of the *law* (as opposed to the resolution of particular claims) involves the doctrine of *stare decises* rather than *res judicata*, and further recognized, as noted above, that an

---

below.

agency may deviate from its own prior announcement of the law "when there is a reasonable basis" for doing so. *Id.*

The Board is persuaded that the very general, procedural nature of the prior ruling concerning scope of review is such that the policy considerations favoring application of the law of the case doctrine have little if any force. The Board must conduct itself in accordance with the statutes and rules which create and govern it. The prior following of a *procedure* which conflicts with the controlling law, and which did not adjudicate the claims of any party or involve the application of law to any particular facts, does not become the "law of the case" such that the Board must persist in following that procedure. Indeed, *Salt Lake Citizen's Congress* recognized that the "authority of state administrative agencies to establish legal rules is limited by the agency's organic statute, statutes the agency administers, constitutional law, and the Utah Administrative Procedures Act (UAPA)." *Id.* at 1252, n.5. Because, as discussed below, the Board's prior limiting of its scope of review to an informal record conflicts with its own organic statute, the Coal Act, as well as UAPA, the Board's ruling on that issue could not have established any binding "law of the case" which conflicted with these laws.

Because the Board's prior ruling pertaining to scope of review involved a purely legal, procedural issue concerning its own powers and duties, rather than the adjudication of any claims or facts, the Board holds that the law of the case doctrine does not apply to that particular ruling. In any event, for the reasons stated above, the Board concludes it has a "reasonable basis" for

deviating from its prior ruling even if the law of the case doctrine were to apply.[3]

II. Scope of Evidence Reviewed By Board In Appeal Under The Coal Act.

The provisions of the Utah Coal Mining & Reclamation Act (the "Coal Act")[4], Utah Oil and Gas Conservation Act (the "Conservation Act")[5], Utah Administrative Procedures Act ("UAPA")[6], the Board's procedural rules, and Utah decisional law construing these statutory and regulatory provisions, all compel the conclusion that the Board, in conducting a "hearing" pursuant to Utah Code Ann. §40-10-14(3), does not limit its review to an informal record developed before the Division, but rather conducts a formal evidentiary hearing in which evidence is taken and an adequate record is developed for purposes of judicial appellate review.

A. The Coal Act.

SUWA filed the present appeal pursuant Section 14 of the Coal Act. Utah Code Ann. §40-10-14. Section 14 provides that the Board shall hold a "hearing" in reviewing the Division's

---

[3] While the Board's present ruling deviates from that made in the case involving the earlier Lila Canyon permit matter, the Board notes that it is consistent with the Board's practice prior to that matter. Specifically, in SUWA's appeal of Andalex's Smokey Hollow Permit Application in 1996, *see In the Matter of the Request by Petitioner Southern Utah Wilderness Alliance for Board Review*, Docket No. 95-023, Cause No. PRO/025/02, and Castle Valley Special Service District's appeal of the Revision of Co-op Mining Company's Bear Canyon Mine permit, *see In the Matter of the Request for Agency Action and Appeal of Division Determination to Approve Significant Revision*, Docket No. 94-027, Cause No. ACT/-15/025, the Board held full evidentiary hearings involving witnesses and exhibits. In neither case did the Board limit its review to an informal administrative record. The Utah Supreme Court affirmed the Board's decision in the *Castle Valley* case, and although the issue of scope of review was not directly at issue, there were challenges that required the Court to review the nature of the Board's factual inquiry (i.e. a full evidentiary hearing), and the Court affirmed the Board's findings of fact based on the evidence adduced at that hearing. *Castle Valley Spec. Serv. Dist. v. Board of Oil, Gas and Mining*, 938 P.2d 248, 253 (Utah 1996).

[4] Utah Code Ann. §40-10-1, *et seq.*

[5] Utah Code Ann. §40-6-1, *et seq.*

[6] Utah Code Ann. §63-46b-1, *et seq.*

action, and following such hearing, shall issue a decision "granting or denying the permit in whole or in part and stating the reasons." *Id.* at §14(3). Section 6.7(2) of the Coal Act, in turn, clearly defines "hearings" for purposes of the Coal Act as "formal adjudicative proceedings" conducted pursuant to UAPA (which as discussed below, involve the taking of evidence). Section 14 of the Coal Act further states that for "purpose[s] of the hearing, the board may administer oaths, subpoena witnesses or written or printed materials, compel attendance of the witnesses or production of materials, and take evidence, including, but not limited to, site inspections of the land to be affected and other surface coal mining operations carried on by the applicant in the general vicinity of the proposed operation." *Id.* at §14(5). This language clearly contemplates the taking of evidence and does not contemplate the Board merely reviewing an informal record.[7] Section 14 further states the Board shall conduct the hearing "pursuant to the rules of practice and procedure of the board" (which as discussed below, also explicitly speak in terms of taking evidence).

The fact that Section 30 of the Coal Act, cited by UEI, is explicit in stating that an appeal of the Board's decision to a reviewing appellate court "is not a trial de novo," and is equally explicit in setting forth appellate-review standards for such an appeal, reinforces the conclusion that Section 14 does not contemplate an appellate-style, on the record review. If such was the intention of the legislature, one would have expected it to use similar language in Section 14 as it used in Section 30. It did not.

[7] That Section 14 of the Coal Act contemplates the Division's informal proceeding and decision being reviewed via a formal evidentiary hearing is reinforced in Section 14's specification that if the Board fails to act on an appeal of Division action, the aggrieved party may seek a remedy in state district court. Utah Code Ann. §40-10-14(6)(b). UAPA, in turn, provides that district court review of informal agency action is conducted "by trial de novo." Utah Code Ann. §63-46b-15.

The only language cited in support of the contention that the Coal Act contemplates an on the record, appellate-style review by the Board is the language of Section 14 which states that an aggrieved party may seek "a hearing on the reasons for the final determination." While the Board agrees that the phrase "on the reasons" indicates that the Board is to review the *issues* which were before the Division, it cannot read additional substantive provisions into that lone phrase to the effect that the Board's review shall be confined to an informal record, when such a reading directly contradicts the many explicit statements to the contrary found elsewhere in the Coal Act and other statutes discussed below.

B. The Conservation Act.

The Utah Oil and Gas Conservation Act is the Board's organic act, setting forth the Board's creation, composition, jurisdiction and duties. *See* Utah Code Ann. §40-6-1 *et seq.* The Conservation Act establishes the Board as a lay legal Board comprised of members with special expertise in oil, gas and mining matters. *Id.* at §4(2). The Conservation Act states that the Board shall conduct its hearings in accordance with UAPA, *id.* at §40-6-10(1), and as noted below, the Board's rules specify that its hearings shall be "formal adjudicative proceedings" under UAPA, which involve the taking of evidence, *see* Utah Admin. Code R641-100-100.

C. The Board's procedural rules.

As noted above, the Coal Act specifies that "hearings" are to be conducted "pursuant to the rules of practice and procedure of the board." Utah Code Ann. §40-10-14(3). The Board's rules provide that hearings are "formal adjudicative proceedings," *see* Utah Admin. Code R641-100-100, governed by UAPA, *see* R641-100-500, in which all parties "will be entitled to introduce evidence, [and] examine and cross-examine witnesses," *see* R641-101-200, and which

shall be conducted "to obtain full disclosure of relevant facts," *see* R641-108-100. The Board's rules speak of receiving documentary evidence, *see* R641-108-200, receiving testimony, *see* R641-108-300, subpoenaing witnesses and documents, *see* R641-108-900, and permitting discovery, *see* R641-108-800. Again, these provisions contemplate formal evidentiary hearings where evidence is taken, and not proceedings which are limited to an informal record developed at the Division level.

That the Board's statute and rules contemplate the Board holding formal evidentiary hearings, rather than acting in an appellate capacity, is consistent with the nature of the Board itself. As discussed above, the Board is constituted as a lay legal body with special technical expertise. It is contrary to the nature of the Board to expect it to sit as an appellate court where it applies legal principles to an existing record, rather than bringing its technical expertise to bear in the taking of evidence and making of findings based on that evidence.

D. UAPA.

As noted above, the Coal Act explicitly states that "hearings" conducted by the Board under the Coal Act's appeal provision are "formal adjudicative proceedings" governed by UAPA. Utah Code Ann. §40-10-6.7(2)(a)(i). UAPA, in turn, defines formal adjudicative proceedings as hearings conducted "to obtain full disclosure of relevant facts," in which the presiding officer will permit parties "to present evidence," and in which "testimony" and "documentary evidence" will be received. Utah Code Ann. §63-46b-8(1). Again, this language clearly contemplates an evidentiary hearing not restricted to the Division's informal record.

That informal agency action is to be reviewed via formal evidentiary hearings, rather than being reviewed on the informal record, is reinforced in Section 15 which specifies that judicial

review of "agency actions resulting from informal adjudicative proceedings" is to be conducted "by trial de novo." *Id.* at §15. Although Section 15 applies to judicial (rather than administrative) review of informal agency action, as discussed below, Utah courts have recognized that UAPA's scheme ensures that informal agency action is reviewed via a formal evidentiary hearing regardless of whether a court or superior agency is the reviewing body.

E. Cases construing UAPA.

Utah courts have recognized that UAPA's statutory scheme ensures that informal agency action is reviewed by formal agency review (with the taking of evidence) or de novo review in district court, noting the policy considerations which underlie this scheme:

> UAPA's statutory scheme ensures that 'each applicant has the opportunity to have a formal hearing before the agency, or a [trial] de novo by the district court.' One reason for this statutory scheme is that appellate courts need a complete record in order to review adjudications. Formal proceedings 'allow the opportunity for fuller discovery and fact finding, [and] are more likely to result in an adequate record for review.' Thus UAPA vests jurisdiction to review *only formal* agency proceedings with the supreme court or court of appeals. Conversely, informal proceedings are less likely to result in an adequate record. The review of an informal agency proceeding by a new trial at the district court level ensures that an adequate record will be created. Only then can this state's appellate courts properly review an informal administrative proceeding.

Cordova v. Blackstock, 861 P.2d 449, 451-52 (Utah 1993) (emphasis in original). Although *Cordova* involved *judicial* review of an informal agency proceeding under Section 15 of UAPA, courts have applied the same analysis in the context of formal *agency* review under Section 8 of UAPA, and have recognized that such review is not performed on the informal record, but rather by the taking of evidence:

> The language in *Cordova* and section 63-46b-8 indicate that a de novo review is inherent in a formal hearing, where the parties have the right to present evidence, argue, respond, and conduct cross-examination. *See* Utah Code Ann. §63-46b-

> 8(1)(d). Furthermore, if the [reviewing] Board were limited to the 'initial hearing officer's findings of fact and conclusions of law,' as [appellant] argues, then the Board's decision would be incapable of appellate review because there would not be a complete record.

Bradbury v. Utah Division of Wildlife Res., 2002 WL 31770900 (Utah App.). As reflected in *Cordova* and *Bradbury*, UAPA ensures that informal agency action will be reviewed either through a formal evidentiary hearing before a reviewing agency tribunal (like this Board), or by de novo review in state district court. In neither case is the review limited to the informal record.

In addition to the need to develop a record adequate for purposes of judicial appellate review, courts have recognized that conducting a formal evidentiary hearing is necessary in reviewing informal agency action because it allows the reviewing tribunal "to consider and act on any deficiencies that might arise by nature of the informality of the agency hearing." *Cordova*, 861 P.2d at 452. *See also*, *Archer v. Board of State Lands and Forestry*, 907 P.2d 1142, 1145 (Utah 1995).[8]

Ultimately, there is no support in the Coal Act, UAPA, the Board's organic act, or any of the rules promulgated thereunder, for the proposition that the Board must assume the role of an appellate court, and strictly limit its review to an informal agency record, when it reviews a Division coal mine permitting decision. Such a procedure is not only contrary to the above-referenced statutes and rules, but would result in a scheme in which an informal agency decision

[8] Problems pertaining to the development of an adequate record for review manifested themselves in the prior Lila Canyon permit matter cited by SUWA. In that matter, SUWA objected to the informal record certified by the Division as "manifestly incomplete," and, because SUWA and the Division could not agree on the contents or completeness of such informal record, SUWA sought discovery in order to ascertain whether additional documents existed which should have been included in the record. *See* discussion set forth in SUWA's Opening Brief at 5-6.

was then twice reviewed under appellate standards (first by the Board and then by the Supreme Court) without a formal evidentiary hearing having ever been conducted, a scheme UAPA was meant to eliminate[9]

The Board must give meaning to all of the statutory provisions governing it in a way which best harmonizes those provisions and is most consistent with the nature of the Board itself. As discussed above, the limiting of the Board's review in the present adjudication solely to the informal administrative record developed by the Division would violate many express statutory and regulatory provisions, would be contrary to the basic scheme established by UAPA, would not result in a record adequate for appellate judicial review, and would be inconsistent with the very nature of the Board as a formal adjudicatory body (rather than an appellate court). For these reasons, the Board will hold a formal adjudication in this matter in which it will review (1) the evidence which was made available to the Division during its permit review process, and (2) other relevant evidence and information not considered by the Division, in order to make its own findings of fact and conclusions of law concerning the legal and factual issues which were involved in the Division's decision. Based upon this evidence, the Board will issue a "written decision . . . granting or denying the permit in whole or in part." Utah Code Ann. §40-10-14(3).

This Order answers only the question briefed by the parties regarding whether the Board's review will be limited to the Division's informal administrative record or will also

[9] *See Taylor v. Utah State Training School*, 775 P.2d 432, 433 n.1 (Utah App.1989) (noting "we have previously criticized this inefficient, two-tiered approach to judicial review of agency decisions, where first the district court and then an appellate court review an agency decision "on the record." The Utah Administrative Procedure Act wisely avoids this duplicative procedure.")

include additional relevant evidence adduced at a formal evidentiary hearing. It does not address questions pertaining to the "standard of review" the Board will apply to such evidence (i.e. what level of deference, if any, will be shown the Division's findings and ultimate decision). Those questions will have to be addressed by the parties in further submissions or at the hearing in this matter.

The Chairman's signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

ENTERED this 9th day of August, 2007.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING

Robert J. Bayer, Acting Chairman

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing ORDER via United States mail, postage prepaid, this 13 day of August, 2007, to the following:

Steven F. Alder
Assistant Attorney General
1594 West North Temple #300
Salt Lake City, Utah 84116

Denise A. Dragoo
Wade R. Budge
SNELL & WILMER L.L.P.
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101

John E. Jevicky
DINSMORE & SHOHL LLP
1900 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202

Stephen Bloch, Esq.
Southern Utah Wilderness Alliance
425 East 100 South
Salt Lake City, Utah 84111

David A. Churchill
Jennet & Block, LLP
601 Thirteenth St. N.W., Suite 1200 South
Washington, D.C. 20005-3823

Kathy C. Weinberg
Jennet & Block, LLP
1717 Main St., Suite 3150
Dallas, Texas 75201-4647

Ray Peterson, Director
Emery County Public Lands Council
P.O. Box 1298
Castle Dale, Utah 84513

Julie Carter